23948

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 378.

MORTIMER WEBSTER, PLAINTIFF IN ERROR,

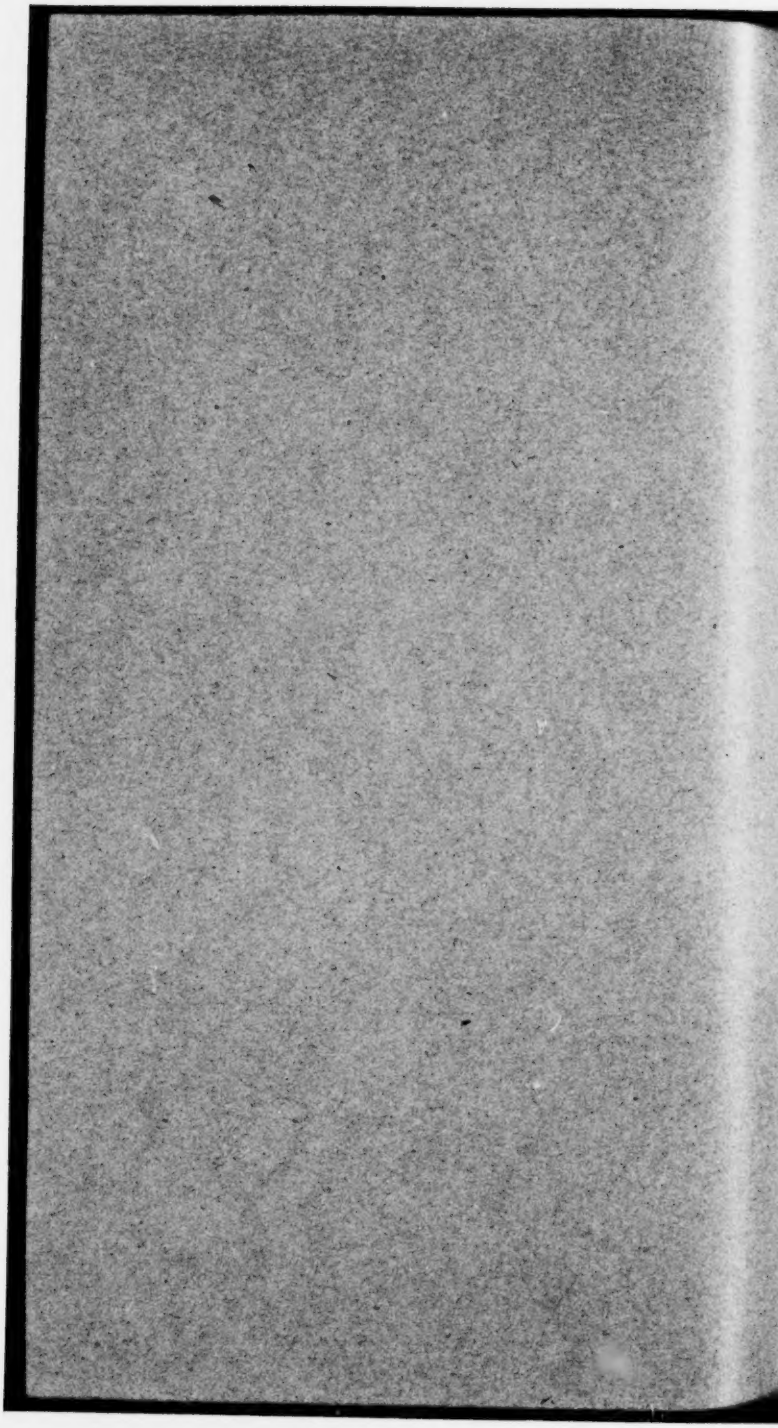
vs.

THE CITY OF FARGO; JAMES M. ROWE, AS AUDITOR OF THE CITY OF FARGO; D. C. ROSS, AS COUNTY TREASURER OF CASS COUNTY, AND O. J. OLSON, AS COUNTY AUDITOR OF CASS COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED AUGUST 6, 1900.

(17,863.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 16, 1900.

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a The President of the United States to the honorable the judges of the supreme court of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of North Dakota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between the said Mortimer Webster, plaintiff and plaintiff in error, and the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants and defendants in error, wherein was drawn in question the validity of a statute of said State and of an authority exercised thereunder, on the ground of being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Mortimer Webster, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within sixty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and
b according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 16th day of May, 1900.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of the Circuit Court of the United States in and for the District of North Dakota, in the Eighth Circuit.

Allowed by—
Hon. J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty

days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of North Dakota, wherein Mortimer Webster is plaintiff in error and you and each of you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17 day of May, 1900, and of the Independence of the United States the one hundred and twenty-fourth.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

Attest: R. D. HOSKINS, *Clerk.*

[Seal Supreme Court, State of North Dakota.]

I, C. J. Mahnken, attorney of record in the supreme court of the State of North Dakota for the defendants and respondents, The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, in the action mention- in the foregoing citation, hereby admit due and personal service of said citation, at the city of Fargo, in the State of North Dakota, this 18th day of May, 1900.

CHARLES J. MAHNKEN,
Attorney for said Defendants & Respondents.

d [Endorsed:] Original. United States Supreme Court. Mortimer Webster, plaintiff in error, against The City of Fargo *et al.*, defendants in error. Seth Newman, attorney for plaintiff in error, Fargo, N. D. 763. Filed in the clerk's office, supreme court, State of North Dakota, May 21, 1900. R. D. Hoskins, clerk.

e STATE OF NORTH DAKOTA, } ss:
In the Supreme Court, }

R. D. Hoskins, being first duly sworn, on oath says that he is the clerk of the supreme court of the State of North Dakota; that owing to other official duties he has been unable to complete the transcript on appeal to the Supreme Court of the United States of America in the case of Mortimer Webster, plaintiff in error, *vs.* The City of Fargo *et al.*, defendants in error, within the time allowed by the following writ of error; that he will be unable to file said transcript with the clerk of the Supreme Court of the United States, at Washington, before August 1st, 1900; that he asks an order extending the time for filing such transcript up to and including August 1st, 1900.

R. D. HOSKINS.

Subscribed and sworn to before me this 25th day of July, 1900.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of North Dakota.

On reading and filing the above affidavit of R. D. Hoskins, and it appearing to the undersigned that good cause exists for extending the time for filing the said transcript, now, therefore,

It is ordered that the time for filing the said transcript be, and the same is, extended to August 1st, 1900.

Given under my hand, at Bismarck, North Dakota, this 25th day of July, A. D. 1900.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

1 UNITED STATES OF AMERICA:

In the Supreme Court.

STATE OF NORTH DAKOTA, } ss:
In the Supreme Court, }

MORTIMER WEBSTER, Plaintiff in Error,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants in Error.

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, in pursuance of the mandate contained in the foregoing attached writ of error, do hereby certify and return that on the 8th day of Feb., 1900, there was filed in my said office the judgment-roll on appeal from the district court of the county of Cass, in the State of North Dakota; which said judgment-roll is in words and figures as follows, to wit:

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

Summons.

The State of North Dakota to the above-named defendants:

You are hereby summoned to answer the complaint in this action, which will be filed in the office of the clerk of the district court of the third judicial district in and for the county of Cass and State of North Dakota, and to serve a copy of your answer upon the sub-

scribers within thirty days after the service of this summons
2 upon you, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated this 30th day of December, A. D. 1899.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff, Rooms 1, 2, 3, and 4, First Nat'l Bank Bldg., Fargo, North Dakota.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO ET AL., Defendants.

Affidavit of Service of Summons.

STATE OF NORTH DAKOTA, }
County of Cass, } ss:

Otto Aurland, being first duly sworn, says that he is over twenty-one years and resides in the city of Fargo, in said county and State; that on the second day of January, 1900, he served the annexed summons in the above-entitled action on the defendants D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, by delivering to each of said defendants a true and correct copy of said summons, at said city of Fargo, in said county of Cass and State of North Dakota.

OTTO AURLAND.

Subscribed and sworn to before me this 31st day of January, 1900.

[SEAL.] W. S. STAMBAUGH,
Notary Public, Cass County, North Dakota.

3 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

Complaint.

Plaintiff, for his complaint herein, alleges:

I.

That the defendant James M. Rowe is the duly elected, qualified, and acting city auditor of said city of Fargo.

II.

That the said defendant, D. C. Ross, is the duly elected, qualified, and acting county treasurer of said county of Cass.

III.

That the said defendant, O. J. Olson, is the duly elected, qualified, and acting county auditor of said county of Cass.

IV.

That this plaintiff is and during all the times hereinafter mentioned was the owner in fee of lot twelve (12), in block one (1), of Keeney & Devitt's addition to said city of Fargo, in said county of Cass and State of North Dakota, which said lot abuts and abounds upon Northern Pacific avenue, which is a street in said city, and also upon Fifth street north, which is a street in said city intersecting said Northern Pacific avenue, and has a frontage upon said Northern Pacific avenue for a distance of twenty-five (25) feet and upon said Fifth street north for a distance of one hundred forty (140) feet.

V.

That on or about the 4th day of March, 1896, the city council of said city of Fargo passed a resolution by which said
4 council declared it necessary to grade, pave, and curb said Fifth street north from said Northern Pacific avenue to First avenue north, a street in said city, and from the east line of Broadway, a street in said city, to the east line of said First avenue north, and in and by said resolution directed said city auditor of the city of Fargo to publish said resolution four consecutive weeks in the official newspaper of said city, and the said city auditor, pursuant to said resolution and law in such case made and provided, caused said resolution to be published in the Fargo Forum and Daily Republican, which is a newspaper of general circulation printed and published in said city of Fargo and which was at said time the official newspaper of said city, on the 7th, 14th, 21st, and 28th days of May, 1896, and due proof of such publication in said newspaper was filed in the office of said city auditor on the 1st day of June, 1896.

VI.

That thereafter, and on or about the 22nd day of June, 1896, the city council of said city of Fargo passed a resolution, by which resolution said city council directed that said Fifth street north be graded, paved, and curbed from said Northern Pacific avenue to said First avenue north, with that part of said First avenue north hereinbefore described, and that a contract be made therefor, and that an assessment for the cost thereof be made, and that said city auditor advertise for bids for said grading, paving, and curbing of said Fifth street north, as aforesaid.

VII.

That pursuant to such resolution the said city auditor prepared a notice that bids for the paving of said Fifth street and First avenue north would be received until seven o'clock p. m. July 6, 1896, and the said city auditor caused the said notice for bids for such paving to be published in the said Fargo Forum and Daily Republican on the 24th, 25th, 26th, 27th, 29th, and 30th days of June and on the 1st, 2nd, 3rd, 4th, and 6th days of July, 1896, and due proof of such publication was filed in the office of said city auditor on the
5 6th day of July, 1896.

VIII.

That among other bids received and filed in said city auditor's office pursuant to said resolution and said advertisement for the grading, paving, and curbing of said Fifth street and said First avenue north was the bid of one Henry O'Neill, filed in said office on or about said 24th day of July, 1896, and before the expiration of the time fixed for receiving bids for such grading, paving, and curbing, which said bid was accompanied by the necessary bond and check, as specified in said notice.

IX.

That upon the opening of the bids received for grading, paving, and curbing said Fifth street and said First avenue north in pursuance to said resolution and said advertisement at a meeting of said city council held at seven o'clock p. m. on said 6th day of July, 1896, the bid of the said Henry O'Neill was declared to be the lowest bid received by said city council and was by said city council accepted, and thereafter, and on or about the 21st day of July, 1896, the said city of Fargo, pursuant to said bid of said Henry O'Neill and the resolution of said council accepting same, entered into a written contract with said Henry O'Neill for the grading, paving, and curbing of said Fifth street north from the said Northern Pacific avenue to said First avenue north, as aforesaid.

X.

That thereupon the city engineer of said city of Fargo proceeded to calculate the amount to be assessed for such improvement upon each lot or parcel of ground abutting or abounding upon the same, including the said lot belonging to this plaintiff; and in estimating such assessment he took the entire cost of such improvement and divided the same by the number of feet fronting or abutting upon said improvement, and the quotient was the sum to be assessed per front foot upon each lot or parcel of land abutting or abounding
6 upon said improvement, including said lot owned by this plaintiff; that said city engineer fully completed his said estimate and entered thereupon as his estimate of assessment against the said lot owned by this plaintiff the sum of four hundred sixty-one $\frac{81}{100}$ dollars, and returned his said estimate of assessment, including the

assessment upon said lot of this plaintiff, to said city council on the 14th day of September, 1896; and upon said estimate of assessment being made and returned to said city council, as aforesaid, the said city auditor of said city caused the same to be published in said Fargo Forum and Daily Republican on the 16th, 17th, 18th, 19th, 21st, 22nd, 23rd, 24th, 25th, and 26th days of September, 1896, together with a notice that the city council of said city of Fargo would hold a meeting on the 28th day of September, 1896, at 7.30 o'clock p. m., to approve said assessment.

XI.

That at a meeting of said city council of the said city of Fargo held on said 28th day of September, 1896, at the time and place mentioned in said notice, the said estimate of assessment so made and returned by said city engineer, as aforesaid, was, by resolution of said city council, duly approved, and said city auditor was directed to make an assessment-roll therefrom, as required by law, and the said city auditor thereupon made an assessment-roll, describing the property so assessed, with the name of the owner and the amount assessed to each lot or parcel of land as approved by said city council, including the amount assessed against said lot belonging to this plaintiff, which was the sum of four hundred sixty-one and $\frac{81}{100}$ dollars, and attached thereto a copy of the resolution of said city council approving said estimate and his certificate that the same was correct, and thereupon filed said assessment-roll with the city treasurer of said city of Fargo for collection.

XII.

That said city treasurer thereupon forthwith published
7 said list three consecutive weeks, once in each week, in the said Fargo Forum and Daily Republican, together with a notice that said assessments would become delinquent if the same were not paid within thirty days after the first publication of said list, together with a notice that a penalty of ten per cent. (10 %) would be added thereto after same became delinquent.

XIII.

That thereafter and after the 9th day of March, 1897, the said assessment-roll was duly filed with the county treasurer of said county of Cass for collection, together with a penalty upon the amount of said assessment of forty-six and $\frac{28}{100}$ dollars ($46.28), which was added to the said assessment by the said city treasurer at the time mentioned in his notice, hereinbefore mentioned.

XIV.

That thereafter, said special assessment being delinquent, said county treasurer of said Cass county delivered said assessment-roll containing such special assessment upon the lot of this plaintiff to the county auditor of said county of Cass, and said county auditor thereupon extended the same upon the tax-roll of said Cass county.

XV.

That the said county auditor of said county of Cass, the defendant herein, threatens to and will, unless restrained by the order and judgment of this court, advertise said lot twelve (12), in said block one (1), of said Keeney & Devitt's addition to said city of Fargo for sale for said delinquent assessment, and threatens to and will offer same for sale and sell the same for such delinquent assessment.

XVI.

That each and every of the acts and proceedings required to be done and taken by the statutes of said State of North Dakota in making and return of said assessment, as aforesaid, were duly taken and done, and said assessment is void and of no force, for the
8 reason that said statutes are in violation of the 14th amendment of the Constitution of the United States.

XVII.

That said assessment, together with the said penalty thereon, is an apparent lien upon said lot twelve (12) so, as aforesaid, owned by this plaintiff, and creates a cloud upon the title of this plaintiff to said premises.

Wherefore plaintiff prays the judgment of this court:

1st.

That the said defendant, O. J. Olson, as county auditor of said Cass county, be forever enjoined and restrained from selling or offering for sale for said delinquent assessment and penalty or either thereof the said premises hereinbefore described.

2nd.

That said assessment and penalty be declared null and void and a cloud upon the title of this plaintiff to said premises.

3rd.

That the said defendant, J. M. Rowe, as city auditor of said city of Fargo; D. C. Ross, as treasurer of said county of Cass, and O. J. Olson, as auditor of said county of Cass, be required to cancel said assessment wherever the same appears upon the books and records of their said offices by a proper entry made by said officers upon their said respective books and records, and for such other and further relief as to this court shall seem meet and proper, together with his costs and disbursements in this action.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff, Fargo, N. D.

STATE OF NORTH DAKOTA, }
County of Cass. } ss:

Seth Newman, being first duly sworn, on oath says that he is a member of the firm of Newman, Spalding & Stambaugh, attorneys

for the plaintiff in the within-entitled action; that he has
9 read the foregoing complaint and knows the contents thereof, and that the same is true to his best knowledge, information, and belief.

SETH NEWMAN.

Subscribed and sworn to before me this 31 day of Jan., 1900.
MAME V. MACKAY (NOW HUTTON),
[SEAL.] *Notary Public, Cass County, North Dakota.*

(Endorsements.)

Complaint.

Due and personal service of the within complaint, by copy, hereby admitted this 1 day of February, 1900, at Fargo, North Dakota.
MAHNKEN, *Attorney for Def't.*
NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff, Fargo, North Dakota.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

The defendants demur to the complaint herein upon the ground that said complaint does not state facts sufficient to constitute a cause of action against the said defendants or either of them.

CHARLES J. MAHNKEN,
Attorney for Defendants, Fargo, N. Dak.

10 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

This cause coming on for hearing on the demurrer of the defendants to the complaint of the plaintiff herein, both parties appearing at this time, the plaintiff appearing by Newman, Spalding & Stambaugh, his attorneys, and raising the question that the statutes of the State of North Dakota, under which the special assessment set forth in the complaint was levied, and said assessment are in viola-

tion of the 14th amendment of the Constitution of the United States, the defendants appearing by C. J. Mahnken, their attorney, and both parties consenting that said demurrer be heard and submitted and the court having heard the same and duly considered the matter:

Now, on motion of C. J. Mahnken, attorneys for the defendants—

It is ordered that said demurrer be, and the same is hereby, sustained, and the plaintiff having announced in open court that he stood upon his demurrer and did not desire to amend his complaint herein—

It is hereby further ordered, on motion of said Mahnken, that the defendants have judgment herein dismissing the complaint of the plaintiff upon the merits, and the clerk is hereby directed to enter such judgment.

Feb'y 6th, 1900.

By the court:

CHAS. A. POLLOCK, *Judge.*

11 To the foregoing order and the whole thereof plaintiff excepts, and such exception is allowed.

Feb'y 6th, 1900.

By the court:

CHAS. A. POLLOCK, *Judge.*

At a term of the district court of the State of North Dakota, held in and for the county of Cass, in the third judicial district, at the court-house, in the city of Fargo, in said county and State, on the 6th day of February, 1900, being a day in the term of said court.

Present: Hon. C. A. Pollock, judge presiding.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

This cause coming on for hearing on the demurrer of the defendants to the complaint of the plaintiff herein, both parties appearing at this time, the plaintiff appearing by Newman, Spalding & Stambaugh, his attorneys, and raising the question that the statutes of the State of North Dakota, under which the special assessment set forth in the complaint was levied, and said assessment are in violation of the 14th amendment of the Constitution of the United States, the defendants appearing by C. J. Mahnken, their attorney, and both parties consenting that said demurrer be heard and submitted, and the court having heard the same and duly considered the matter, and the court having sustained the demurrer of the defendants and ordered that judgment herein dismissing the complaint of the plaintiff upon the merits, and for the costs and disbursements of the defendants, be entered by the clerk:

Now, on motion of C. J. Mahnken, attorney for defendants—
12 It is ordered, adjudged, and decreed that the complaint of the plaintiff herein be, and is hereby, dismissed upon the merits.

Witness the Honorable Charles A. Pollock, judge of the said court, at the court-house, in the city of Fargo, in said county of Cass and State of North Dakota, this 6th day of February, 1900.

[SEAL.]

Attest: E. M. PATTON, *Clerk*,
By W. A. BROWN, *D'p'y.*

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

I, E. M. Patton, clerk of the district court of the State of North Dakota in and for the county of Cass, hereby certify that the foregoing is a true and correct copy of a judgment this day entered by me in the judgment book in my office and of the whole thereof as the same now remains of record in my said office.

Witness my hand and the seal of said court this sixth day of February, A. D. 1900.

E. M. PATTON, *Clerk*,
[SEAL.] By W. A. BROWN, *Dep.*

Notice of entry of foregoing judgment is hereby admitted this — day of February, 1900.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff.

13 (Endorsement:) Filed in the office of clerk of district court, Cass Co., N. Dak., Feb. 6, 1900. E. M. Patton, clerk. W. A. Brown, deputy.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

I, Charles A. Pollock, judge of the district court of the State of North Dakota in and for the third judicial district, hereby certify that the foregoing papers, to wit, summons, complaint, demurrer, order sustaining demurrer and for judgment, judgment, are contained in and constitute the judgment roll in the above-entitled action and the whole thereof.

By the court:

CHAS. A. POLLOCK, *Judge.*

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor, ET AL., Defendants.

I, E. M. Patton, clerk of the district court within and for the said county of Cass, in the third judicial district of the State of North Dakota, do hereby certify that the above and foregoing
14 papers are the original notice of appeal, admission of service thereon, and waiver of undertaking, and also the original judgment-roll and certificate of the judge thereto appended, in the above-entitled action, wherein Mortimer Webster is plaintiff and The City of Fargo *et al.* are defendants, as the same now remains of record in said court, and the same are transmitted to the supreme court pursuant to said appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said court this seventh day of Feb'y, A. D. 1900.

E. M. PATTON, *Clerk,*
[SEAL.] By W. A. BROWN, *Deputy.*

(Endorsements:) Certificate of judgment-roll. Filed in the office of clerk of district court, Cass Co., N. Dak., Feb. 7, 1900. E. M. Patton, clerk. W. A. Brown, deputy.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

Notice of Appeal.

To the above-named defendants and C. J. Mahnken, their attorney:

You will please take notice that the plaintiff in the above-entitled action appeals to the supreme court of the State of North Dakota from the judgment entered in said action on the sixth day of February, 1900, and from the whole thereof.

Dated February 6, 1900.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff, Fargo, N. D.

Due and personal service of the foregoing notice is hereby
15 admitted, at the city of Fargo, in said county and State, on this sixth day of February, 1900, and all undertakings on said appeal are hereby waived.

MAHNKEN,
Attorney for Defendants.

(Endorsements:) Notice of appeal. Filed in the office of clerk of district court, Cass Co., N. Dak., Feb. 7, 1900. E. M. Patton, clerk.

On March 27th, 1900, the said cause was argued before the court and by the court take under advisement.

On May 5th, 1900, the said court entered an order affirming the judgment of the district court in and for the county of Cass, North Dakota; which order is in words and figures as follows, to wit:

File No., 763.

STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

MORTIMER WEBSTER, Plaintiff and Appellant,
vs.
THE CITY OF FARGO ET AL., Defendants and Respondents.

Appeal from the district court of Cass county.

This action coming on to be heard at the March, A. D. 1900, term of this court, at the supreme court room, in the city of Fargo, State of North Dakot—apresent, J. M. Bartholomew, chief justice; Alfred Wallin and N. C. Young, associate justices—and the appeal herein having been submitted for the appellant and for respondent-, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court within and for said Cass county appealed from herein be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby,
16 remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondents have and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

Dated May 5th, 1900.

By the court:

J. M. BARTHOLOMEW,
Chief Justice.

[SEAL.]

Attest: R. D. HOSKINS, *Clerk.*

On May 5th, 1900, the said court filed an opinion; which opinion is in words and figures as follows, to wit:

In the Supreme Court, State of North Dakota, March Term, 1900.

MORTIMER WEBSTER, Appellant,
vs.
THE CITY OF FARGO ET AL., Respondents.

A legislative enactment which charges the entire cost of paving the streets of a city against the property abutting the paving and in proportion to frontage is not in contravention to the fourteenth amendment to the Federal Constitution.

In exercising the power of local assessment the legislature is not limited to the actual increase in value of the property assessed resulting from the local improvement (Rolph *vs.* City of Fargo, 7 N. D., 640, followed).

(Syllabus by the court.)

17 Appeal from the district court of Cass county, Hon. Chas. A. Pollock, judge.

Newman, Spalding & Stambaugh, for appellant.

C. J. Mahnken and J. E. Greene, for respondents.

BARTHOLOMEW, *C. J.:*

This action was brought to cancel and annul a special assessment for paving purposes in the city of Fargo. The assessment was levied in 1896, pursuant to the statutes then in force, being article 17 of chapter 28, Political Code of 1895. The complaint affirmatively sets forth the due compliance with all the statutory requirements in making the assessment and seeks to avoid the assessment upon the sole ground that the statute under which it was made contravenes the fourteenth amendment to the Federal Constitution, in that it deprives the owner of the premises of his property without due process of law and of the equal protection of the laws and without an opportunity to be heard as to the justice of the amount demanded. A demurrer to the complaint was sustained. This assessment was made under section 2280, Revised Codes of 1895, which reads: "Whenever any work or improvement mentioned in the preceding section shall have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to

the meeting of the city council to approve the same." A
18 similar assessment under this same section, and resting in all respects upon the same basis, was before this court in Rolph *vs.* City of Fargo, 7 N. D., 640. That assessment was resisted upon substantially the same grounds that are urged here. As the question was then new in this jurisdiction, and was of much importance, and as this court conceived the adjudications upon the point to be conflicting and somewhat uncertain, a very elaborate opinion was prepared by Chief Justice Corliss, in which the underlying principles were discussed at length, and the leading cases upon all phases of the question were cited. After the fullest consideration we upheld the assessment. We are now asked, however, to reverse the holding for the reason that the Federal Supreme Court, in the case of Village of Norwood *vs.* Baker, 172 U. S., 269, decided since our decision in the Rolph case, have established the broad principle that all special assessments upon the basis of frontage are in violation of the fourteenth amendment to the Federal Constitution, in that they may result in the taking of property without due process of law. That appellant's view of that case has support in the case is shown by the fact that the decision has been thus construed in Fay *vs.* City of Springfield, 94 Fed. Rep., 409, and Cowley *vs.* City of Spokane, 99 Fed. Rep., 840. After a careful study of the opinion in Norwood *vs.* Baker, we are not convinced that the court intended to enunciate the broad proposition for which appellant contends. Rather we think that case depended entirely upon the particular statutes of the State of Ohio there considered, and that such statutes as construed by that court authorized a special assessment on the front-foot plan without and legislative determination, express or implied, that such property had been specially benefitted to the extent of the special assessment, or at all. As we read the opinion the assessment was not held void because it was levied on the front-foot plan—a special assessment by valuation would have been equally void and for the same reason—because corresponding special benefit had been in no way ascer-
19 tained or declared. We do not think the court intended to negative the proposition that a legislature has power to fix the taxing district that should be specially benefitted by a designated improvement and place the entire cost of such improvement upon such taxing district. We think that court has repeatedly held the affirmative of that proposition. In Spencer *vs.* Merchant, 125 U. S., 763, that court said: "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, and repairing of a street, to be assessed upon the owners of lands benefitted thereby; and the determination of the territorial districts which should be taxed for a local improvement is within the province of legislative discretion." In Williams *vs.* Eggleston, 170 U. S., 304, the court said: "Neither can it be doubted that, if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be con-

sidered as benefitted by a proposed improvement." In Mobile County *vs.* Kimball, 102 U. S., 691, the court said at page 703: "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefitted by the expenditure." In Bauman *vs.* Ross, 167 U. S., 548, the court said at page 589: "But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole State or
20 by the district or neighborhood immediately benefitted;" and again: "The legislature in the exercise of the right of taxation has the authority to direct the whole or such part as it may prescribe of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street to be assessed upon the owners of lands benefitted thereby;" and again: "The class of lands to be assessed for the purpose may be either determined by the legislature itself by defining a territorial district or by other designation, or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands and such only as the commissioners shall decide to be benefitted;" and still further: "The rule of apportionment among the parcels of land benefitted also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners." In Parsons *vs.* District of Columbia, 170 U. S., 45, the court sustained a specific assessment per front foot upon property abutting upon a street improvement, and quoted with approval from section 752, Dillon on Municipal Corporations (4th ed.), as follows: "Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefitted, and, if in the latter mode, whether the assessment shall be upon all property found to be benefitted or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency;" and see also Irrigation District *vs.* Bradley, 164 U. S., 112; Davidson *vs.* New Orleans, 96 U. S., 97; Wolston *vs.* Nevin, 128 U. S., 578; Shoemaker *vs.* United States, 147 U. S., 282; Paulson *vs.* Portland, 149 U. S., 30; Willars *vs.* Presbury, 81 U. S., 676. In all these cases, as we understand
21 them, the power of the legislature to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, has been recognized

and declared. We do not believe it was the intention of the Federal Supreme Court in Norwood *vs.* Baker to depart from this line of decisions. It is true that in many of these cases the court speaks of these special assessments as being dependent upon special benefits, and to be made according to benefits received. We endeavored in the Rolph case to show that all taxation was, in theory, based upon benefits conferred, and that, in theory, those benefits must always equal or exceed the burden imposed. Upon no other ground can taxation be ethically defended. It matters not whether the taxation be for the general support of the government that protects person and property, or for the maintenance of the schools that furnish education, or for the construction of buildings in which the public may transact business—alike in each case the theory is benefits conferred commensurate with the burdens imposed. This legislative power of general taxation for public purposes is so universally conceded that no tax-payer ever raises the question of benefits. Indeed, he cannot raise it, because the legislative authorization of the tax is a legislative determination that the tax is for the benefit of the public, and the right of the legislature to make that determination is exclusive, and, it being once established that the tax is for the benefit of the public, no individual member of that public can be heard to say that he is not benefitted, or that he is not benefited as largely as any other individual having the same amount of taxable property. Of course, this power of the legislature, while plenary within the limits of the constitution, yet is not an arbitrary power. The taxation must be for a public purpose. An attempt to lay a general tax for a private purpose would be confiscation and a court would at once defeat it. But a proper State tax is con-

22 clusively presumed to be for the benefit of every tax-payer in the State; a proper county tax is conclusively presumed to be for the benefit of every tax-payer in the county, and so for cities, townships, and school districts. In each instance the tax is presumed to be for the benefit of every tax-payer in the taxing district. Yet experience teaches us every day that this is only a theory. It is not a fact and never can be; but it must be adhered to as a theory and accepted as a fact or taxation must cease. The legislature may make a mistake. It may authorize a tax for a public purpose that ultimately fails to prove a public benefit in fact; but that does not affect the legislative power.

These general principles apply to and control special taxation and special assessments. The fact that the legislature has by law fixed certain permanent taxing districts does not deprive it of the power to fix other and special taxing districts, when by legislative determination such district is to receive a special benefit. It may not tax one district for the benefit of another any more than it might tax one county for the benefit of another, or authorize a general tax for a private purpose. But if the purpose be one that ostensibly and reasonably confers a special benefit upon a special locality, then the legislative power is plenary within the limits of the organic law. As said by Mr. Justice Brewer in his dissenting opinion in Norwood *vs.* Baker: "The legislative act charging the entire cost of an im-

provement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost." And this legislative determination having been reached and the legislature having the exclusive power to make the determination, it cannot be questioned; and the fact of special benefit to the special district being thus established no tax-payer in that district can be heard to say that he is not benefited or that he is not benefited as
23 largely as any other tax-payer in the special taxing district having the same valuation, area, or frontage, as the case may be. No reason can be assigned why the tax-payer in the special district should have any more right to raise that question than the tax-payer in the permanent district. It never can be correct to say that special assessments must be measured by special benefits and can never exceed them. That is true in theory, but only in theory. In practice it cannot be enforced. The moment we concede that any one tax-payer has the right to the judgment upon the question of his benefits of any tribunal, except the legislature or the body authorized by the legislature to decide the matter, that moment we defeat the power of the legislature to make or authorize special assessments.

We adhere to our holding in Rolph *vs.* City of Fargo, and the judgment in this case is affirmed.

All concur.

J. M. BARTHOLOMEW.
ALFRED WALLIN.
N. C. YOUNG.

On the 17th day of May, 1900, a petition for writ of error was filed in said court and is in words and figures as follows, to wit:

In Supreme Court, State of North Dakota.

MORTIMER WEBSTER, Plaintiff and Appellant,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants and Respondents.

Petition for Writ of Error.

To the Honorable J. M. Bartholomew, chief justice of the supreme court of the State of North Dakota:

The above-named plaintiff and appellant, feeling himself
24 aggrieved by the judgment of said supreme court of the State of North Dakota in the above-entitled cause, entered on the 5th day of May, 1900, complains that in the record and proceedings had in said cause, and also in the rendition of the judgment therein in the said supreme court at the March term thereof, A. D. 1900, against said plaintiff and appellant, on the said 5th day of May, 1900, manifest error hath happened, to the great damage of said plaintiff and appellant.

Wherefore said plaintiff prays for the allowance of a writ of error to the Supreme Court of the United States from said judgment, and for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and process as may cause the same to be corrected by the said Supreme Court of the United States.

Dated this ninth day of May, 1900.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff and Appellant.

On the 17th day of May, 1900, an order allowing writ of error was filed in said court and is in words and figures as follows, to wit:

At a term, to wit, the March term, 1900, of the supreme court of the State of North Dakota, held at the court-room, in the capitol, in the city of Bismarck, on the 12th day of May, A. D. 1900.

Present: The Honorable J. M. Bartholomew, chief justice.

MORTIMER WEBSTER, Plaintiff and Appellant,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants and Respondents.

Order Allowing Writ of Error.

Upon motion of Newman, Spalding & Stambaugh, attor-
25 neys for the plaintiff and appellant, and upon filing a petition for a writ of error and an assignment of errors—

It is ordered that a writ of error be, and the same is hereby, allowed, to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and the same is hereby, fixed at five hundred dollars.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

On the 17th day of May, 1900, an assignment of errors was filed in said court, and is in words and figures as follows, to wit:

In the Supreme Court of the United States, —— Term, 1900.

MORTIMER WEBSTER, Plaintiff in Error,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants in Error.

Assignment of Errors.

Afterward, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, in the city of Washington, comes the said Mortimer Webster, plain-

tiff in error, by Seth Newman, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

That the complaint in said action and the matters therein contained are sufficient in law for the said Mortimer Webster to have or maintain his action aforesaid against the said The City of
26 Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants in error, because the acts and proceedings set forth in his said complaint as constituting a special assessment against his property, as therein set forth, and the statutes of the State of North Dakota under which said acts and proceedings were had and taken are in violation of the fourteenth amendment of the Constitution of the United States; and said special assessment constitutes a cloud upon the title of the property of the said Mortimer Webster, and the threatened sale thereof would create irreparable injury to him.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants in error, against the said Mortimer Webster, whereas by the law of the land the said judgment ought to have been given for the said Mortimer Webster against the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, and the said Mortimer Webster prays the judgment aforesaid may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment.

Dated this 15th day of May, 1900.

SETH NEWMAN,
Counsel for Plaintiff in Error.

On the 17th day of May, 1900, a bond was filed in said court, and said bond is in words and figures as follows, to wit:

27 Supreme Court of the United States.

MORTIMER WEBSTER, Plaintiff in Error,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants in Error.

Know all men by these presents that we, Mortimer Webster, of the city of Fargo and State of North Dakota, plaintiff in error and principal, and the Fidelity and Deposit Company of Maryland, a corporation, duly authorized by law to become surety herein, are held and firmly bound unto the City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass

county, and O. J. Olson, as county auditor of Cass county, defendants in error, in the sum of five hundred dollars ($500), to be paid to the said City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, their successors, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and the said Mortimer Webster binds his heirs, executors, and administrators firmly with these presents.

Sealed with our seals. Dated this 16th day of May, 1900.

Whereas the above-named Mortimer Webster hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of North Dakota:

Now, therefore, the condition of this obligation is such that if the above-named Mortimer Webster shall prosecute his said writ
28 of error to effect and answer all costs and judgments, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MORTIMER WEBSTER,
By NEWMAN, SPALDING & STAMBAUGH, *His Attorneys.*
THE FIDELITY & DEPOSIT CO. OF MARYLAND,
[COMPANY SEAL.] By W. C. RESSER, *Its Att'y-in-fact.*

[Three cents U. S. internal-revenue stamps canceled.]

I hereby approve of the foregoing security and of the surety therein.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

Dated May 17, 1900.

In testimony whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of North Dakota, this 25th day of July, A. D. 1900.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court of the State of North Dakota.

Endorsed on cover: File No., 17,863. North Dakota supreme court. Term No., 378. Mortimer Webster, plaintiff in error, *vs.* The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county. Filed August 6th, 1900.